

TAI CHOI YU

a

v.

IAN CHIN HON CHONG

HIGH COURT SABAH & SARAWAK, MIRI

b

SULAIMAN DAUD JC

[SUIT NO: 22-129-98]

9 FEBRUARY 2002

CIVIL PROCEDURE: Counsel appearing in court - Whether authorised or instructed - Whether appearing as *amicus curiae* - Whether a matter of public interest

c

CIVIL PROCEDURE: Writ of summons - Renewal - Second application for renewal - Whether new O. 6 r. 7(2) & (2A) Rules of the High Court 1980 applicable - Whether subject matter of writ subjudice appeal of suit pending before Court of Appeal - Whether *status quo* of parties to be maintained until disposal of appeal - Whether writ based on claim that was unsustainable - Prejudice to defendant - Courts of Judicature Act 1964, s. 14(1)

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CONSTITUTIONAL LAW: Courts - Judges' immunity - Plaintiff's claim for damages for alleged libel in written judgment - Whether claim sustainable - Courts of Judicature Act 1964, s. 14(1)

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The plaintiff appealed against the decision of the senior assistant registrar dismissing his application to extend the validity of the writ of summons in this action ('the writ'). The writ had already been extended once and this appeal was in relation to the dismissal of the application for the second extension. The plaintiff's claim against the defendant, a High Court judge, was for damages for libel contained in a written judgment delivered by the defendant ('the 1990 suit'). The plaintiff gave two grounds to justify the application for extension. Firstly, that the subject matter of the writ was subjudice the appeal of the 1990 suit pending before the Court of Appeal. Secondly, the plaintiff deemed fit for the *status quo* concerning him and the defendant be maintained until the disposal of his various appeals to the Court of Appeal including his appeal against conviction for contempt of court by the defendant. At the outset of the hearing, the plaintiff objected to the presence of a senior federal counsel appearing on behalf of the defendant on the ground that the application was *ex parte* and that the said counsel had not been retained by the defendant to act on his behalf.

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a Held:

- b** [1] An *amicus curiae* is a friend of the court, being a person who voluntarily or on invitation of the court, and not on the instruction of any party helps the court in any judicial proceedings. In the present case, notwithstanding that the senior federal counsel had volunteered to help the court in her capacity as *amicus curiae*, she could only be heard if invited by the court to do so. It is beyond any shadow of a doubt that a judge acting judicially is not, by virtue of s. 14 of the Courts of Judicature Act 1964, liable to be sued in any civil court for any act done by him in the discharge of his judicial duty. Any suit against a judge for an alleged libel contained in his written judgment will undoubtedly involve a matter of public interest. Therefore, based on the subject matter of the writ and the fact that the senior federal counsel was invited by the senior assistant registrar in the hearing before him, there was no valid reason to object to the presence of the senior federal counsel as *amicus curiae* to appear and be heard in this application. There was also no prejudice to the plaintiff's case by reason thereof. (p 263 c-f)
- e** [2] On the facts herein, the new O. 6 r. 7(2) and (2A) RHC should not be given a retrospective effect. It is obvious that the new rules create a new obligation or impose a new duty on the part of the applicant to satisfy the court by way of affidavit evidence that efforts have been made to serve the defendant within one month of the date of issue of the writ. To give the new O. 6 r. 7(2) and (2A) a retrospective operation will definitely impair the applicant's existing right and obligations as no such requirement were provided under the old rule. (p 264 e)
- f**
- g** [3] On the first ground advanced by the plaintiff to justify the application for extension of the writ, the indorsements in the writ merely stated that the plaintiff's claim was for damages for libel contained in a written judgment dated 9 October 1997 in respect of the 1990 suit delivered and published by the defendant and that the defendant sought for an order for certain part of the judgment to be expunged therefrom. Further, the plaintiff had not even filed the statement of claim for the court to make a finding whether the plaintiff's action herein was in effect subjudice the said appeal. In any event it was not for the plaintiff to determine whether the subject matter of the writ was subjudice so as to justify his failure to serve the writ to the defendant within the validity period. (pp 265 h-i & 266 a)
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- i**

- [3a] The second ground for withholding the service of the writ was undoubtedly without any merit. The various appeals referred to by the plaintiff were in fact appeals against the order or decision of the defendant in the exercise of his judicial function. Therefore, there was no basis in the plaintiff's contention that the service of the writ should not be effected to maintain the *status quo* pending the disposal of the appeal. Moreover, it was for the court and not the litigant to decide whether any proceedings should be stayed pending the disposal of other proceedings related thereto. In the circumstances, the two grounds advanced by the plaintiff did not constitute "good reason" for not effecting the service of the said writ during its validity period. (p 266 b-d) a
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- [4] The basis of the plaintiff's claim was in respect of an alleged libel contained in the defendant's written judgment in the 1990 suit. It was without doubt that the said judgment was written and delivered by the defendant in the discharge of his judicial function as the trial judge in the said suit. In view of the immunity conferred on the defendant by s. 14(1) of the Courts of Judicature Act 1964, the plaintiff's action against the defendant was clearly unsustainable and doomed to fail right from the outset. Also, the hardship to the defendant if the writ was extended would far outweigh the hardship to the plaintiff if the extension was disallowed. (p 266 e-g) d
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[Appeal dismissed.]

Case(s) referred to:

- Battersby & Ors v. Anglo-American Oil Co Ltd & Ors* [1945] 1 KB 23 (*refd*) f
Easy v. Universal Anchorage [1974] 1 WLR 899 (*refd*)
Kleinwort Benson Ltd v. Barbak Ltd [1987] 2 All ER 289 (*refd*)
Llyod Triestino Societa v. Chocolate Products (Malaysia) Sdn Bhd [1978] 2 MLJ 27 (*refd*)
Official Receiver, Liquidator of Jason Textile Industries Pte Ltd v. QBE Insurance (International) Ltd [1989] 1 MLJ 1 (*refd*) g
Re Application by Hamid Hassan [1979] 2 MLJ 183 (*refd*)
Sim Seoh Beng & Anor v. Koperasi Tunas Muda Sungai Ara Bhd [1995] 1 CLJ 491 (*refd*)
Ye Bon Tew & Anor v. Kenderaan Bas Mara [1983] AC 553 (*refd*)

Legislation referred to: h

- Courts of Judicature Act 1964, s. 14(1)
 Rules of the High Court 1980, O. 6 r. 7(2), (2A)

Other source(s) referred to:

- P Ramanatha Aiyar, *The Law Lexicon*, 2nd edn, 1997 i

a For the plaintiff - Tai Choi Yu; M/s Tai Choi Yu
Amicus curiae - Azizah Hj Nawawi SFC

Reported by Usha Thiagarajah

JUDGMENT

b **Sulaiman Daud JC:**

This is an appeal by the plaintiff against the decision of the learned senior assistant registrar dismissing his application to extend the validity of the writ of summons in this action (“the said writ”). The said writ which was issued on 1 October 1998 was extended once by the learned senior assistant registrar for a period of twelve months from 1 October 1999 to 31 September 2000. This appeal relates to the dismissal of the application for the second extension.

c The said writ is indorsed with the concise nature of the plaintiff’s claim which reads as follows:
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The plaintiff claims is for:

- e* 1. Damages for libel contained in a written judgment dated 9th October 1997 in Miri High Court Suit No. MR 26 of 1990 delivered and/or published by the Defendant;
2. An order that the impugned part and/or portion of the impugned judgment numbering eight (8) pages in all be expunged and/or expurgated and/or excluded from the said expugned judgment;
- f* 3. Interest on the damages at the rate of 8% per annum from the date herein until final settlement or at such rate and for such period of time as the courts deems just; and
4. Such other relief as the Court seems just.

From the aforesaid indorsement it is obvious that the plaintiff’s claim against the defendant is for damages for an alleged libel contained in the written judgment of the defendant in respect of the Miri High Court Suit No. MR 26 of 1990 (“the 1990 Suit”).

The application was *ex parte* but at the very outset of the hearing Puan Azizah Hj Nawawi, a senior federal counsel of Attorney General Department appeared before the court. Mr Tai Choi Yu, the plaintiff, objected to her presence at the hearing on the ground that the application was *ex parte* and that she was not retained by the defendant to act on his behalf. He further argued that a judge is not a public servant and therefore cannot be represented by the senior federal counsel in this proceedings. Puan Azizah explained that she was not acting for the defendant but only appeared as *amicus curiae*. She also informed the court that she was

allowed to appear in such capacity in the hearing before the learned senior assistant registrar. To justify her presence as *amicus curiae* she argued that the application involved a matter of public interest where a judge is being sued for an alleged libel contained in his written judgment. The learned senior federal counsel also cited the case of *Re Application By Hamid bin Hassan* [1979] 2 MLJ 183, where the trial judge in an *ex parte* application allowed a senior federal counsel to appear in that proceedings as *amicus curiae* upon the invitation of the court.

Who is an *amicus curiae*. In P. Ramanatha Aiyar's *The Law Lexicon*, 2nd edn. 1997, *amicus curiae* is defined as a friend of the court, being a person who voluntarily or on invitation of the court, and not on the instruction of any party helps the court in any judicial proceedings. In the instant case notwithstanding that the senior federal counsel has volunteered to help the court in her capacity as *amicus curiae*, however, in my view she can only be heard if invited by the court to do so. It is beyond any shadow of doubt that a judge acting judicially is not, by virtue of s. 14 of the Courts of Judicature Act 1964, liable to be sued in any civil court for any done by him in the discharge of his judicial duty. I therefore agree with the senior federal counsel that any suit against a judge for an alleged libel contained in his written judgment will undoubtedly involve a matter of public interest. Having considered the subject matter of the suit and the fact that the senior federal counsel was invited by the learned senior assistant registrar in the hearing before him, I did not see any valid reason to object to the presence of the senior federal counsel as *amicus curiae* to appear and be heard in this application. I therefore overruled the plaintiff's objection and invited the senior federal counsel to appear in the proceedings as such. I am also of the view that the presence of the senior federal counsel at the hearing will not in any way be prejudicial to the plaintiff's case.

I now consider the substantive issue raised in the appeal.

The Law Applicable

With the amendment to the Rules of the High Court 1980 *vide* P.U.(A) 342 dated 21 September 2000, O. 6 r. 7(2) which deal with the issue of writ was revoked and substituted with the new rr. 7(2) and 7(2A). The new r. 7(2A) expressly provide for the affidavit supporting the application to show that efforts have been made to serve the defendant within one month of the date of issue of the writ and that efforts have been made subsequent thereto to effect service. The old rule relating to the renewal of writ in force before 22 September 2000, then O. 6 r. 7(2), is silent with regard to the grounds on which the court is to exercise its power for such extension. The question is whether the renewal of the present writ which was issued and renewed before the coming into force of the said amendment is subject to the new provisions. In other words whether the new O. 6 r. 7(2) and (2A) have to be given a retrospective effect.

- a* On the point of retrospectivity, Lord Brightman in the Privy Council case of *Ye Bon Tew & Anor v. Kenderaan Bas Mara* [1983] AC 553, [1983] 1 MLJ 1, made the following observation:
- ... there is at common law a *prima facie* rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposed new duty, or attaches new disability, in regard to events already passed.
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- c* In *Sim Seoh Beng & Anor v. Koperasi Tunas Muda Sungai Ara Bhd* [1995] 1 CLJ 491, Gopal Sri Ram JCA, having examined the authorities on the issue of retrospectivity, concluded, at p. 496, as follows:
- In our judgment, the correct test to be applied to determine whether a written law is prospective or retrospective is to first ascertain whether it would affect substantive rights if applied retrospectively. If it would, then, *prima facie* that law must be construed as having prospective effect only, unless there is clear indication in the enactment that it is in any event to have retrospectivity.
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- e* On the facts of the present case in my judgment the new O. 6 r. 7(2) and (2A) should not be given a retrospective effect. It is obvious that the new rules create a new obligation or imposed new duty on the part of the applicant to satisfy the court by way of affidavit evidence that efforts have been made to serve the defendant within one month of the date of issue of the writ. To give the new O. 6 r. 7(2) and (2A) a retrospective operation will definitely impair the applicant's existing right and obligations as no such requirement were provided under the old rule.
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- There are numerous authorities on the principles to be applied by the court on an application for the extension of the validity, including renewal, of a writ under the old O. 6 r. 7.
- g* In *Llyod Triestino Societa v. Chocolate Products (Malaysia) Sdn Bhd* [1978] 2 MLJ 27, the Federal Court adopted with approval the observation made by Lord Goddard LJ (as he then was) in *Battersby & Ors v. Anglo-American Oil Co. Ltd. & Ors* [1945] 1 KB 23, at p. 32-33, that:
- h* ... even when an application for renewal of a writ is made within twelve months of the date of issues, the jurisdiction given by the rule ought to be exercised with caution. It is the duty of a plaintiff who issues a writ to serve it promptly, and renewal is certainly not to be granted as of course on an application which is necessarily made *ex parte*. In every case care should be taken to see that the renewal will not prejudice any right of defence then existing, and in any case it should only be granted where the court is satisfied that good reasons appear to excuse the delay in the service ...
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The requirement of “good reason” to justify such an extension was also adopted in *Easy v. Universal Anchorage* [1974] 1 WLR 899, where Lord Denning MR made the following observation:

The only principle is that a writ is not to be renewed except for good reason. That appears from the cases starting with the judgment of Megaw J in *Heaven v. Road and Rail Wagons Ltd* [1965] 2 QB 355 and followed in this court in *Baker v. Bowketts Cakes Ltd* [1966] 1 WLR 861 and *Jones v. Jones* [1970] 2 QB 576.

In *Official Receiver, Liquidator of Jason Textile Industries Pte Ltd. v. QBE Insurance (International) Ltd* [1989] 1 MLJ 1, the Singapore Court of Appeal held that in an application for renewal the case has to be looked at as a whole and all circumstances considered in deciding whether there are good reasons for extending the validity of the writ.

Another relevant consideration in exercising the discretion whether to grant or refuse the renewal of a writ is the balance of hardship to the plaintiff if extension is refused and hardship to the defendant if it is allowed. This principle was adopted by the House of Lord in *Kleinwort Benson Ltd v. Barbak Ltd* [1987] 2 All ER 289, where Lord Brandon said at p. 300:

The decision whether an extension should be allowed or disallowed is a discretionary one for the judge who deals with the relevant application. *Jones v. Jones* shows that, in exercising that discretion, the judge is entitled to have regard to the balance of hardship. In doing so, he may well need to consider whether allowing an extension will cause prejudice to the defendant in all the circumstances of the case.

I turn now to apply the aforesaid principles to the present case. The plaintiff gave two main grounds to justify the application for the extension. Firstly it is contended that the subject matter of the writ herein which relate to an alleged libel contained in the written judgment of the 1990 Suit is subjudice the appeal of the said suit which is still pending before the Court of Appeal. Secondly in view of the various appeals pending before the Court of Appeal, including his conviction for contempt of court by the defendant, the plaintiff deem it fit for the *status quo* concerning him and the defendant be maintained until the disposal of all such appeal.

With regard to the first ground, based on the evidence available before the court I cannot see how the plaintiff action herein is subjudice the appeal of the 1990 Suit. The indorsements in the writ merely state that the plaintiff’s claim is for damages for libel contained in a written judgment dated 9 October 1997 in respect of the 1990 Suit delivered and published by the defendant and that the defendant sought for an order for certain part of the judgment to be expunged therefrom. Further the plaintiff had

a not even filed the statement of claim for the court to make a finding whether the plaintiff's action herein is in fact subjudice the said appeal. In any event it is not for the plaintiff to determine whether the subject matter of the writ is subjudice so as to justify his failure to serve the writ to the defendant within the validity period.

b The second ground for withholding the service of the writ is undoubtedly without any merit. The various appeal referred to by the plaintiff are in fact appeal against the order or decision of the defendant in the exercise of his judicial function. Therefore there is no basis in the plaintiff's contention that the service of the writ should not be effected to maintain
c the *status quo* pending the disposal of the appeal. Moreover it is for the court and not the litigant to decide whether any proceedings should be stayed pending the disposal of other proceedings related thereto. In the circumstances it is my finding that the two grounds advanced by the plaintiff do not constitute "good reason" for not effecting the service of
d the said writ during its validity period.

It is also clear from the indorsement on the writ that the basis of the plaintiff's claim is in respect of an alleged libel contained in the defendant's written judgment in the 1990 Suit. It is without doubt that the said judgment was written and delivered by the defendant in the discharge of his judicial function
e as the trial judge in the said suit. The Courts of Judicature Act 1964, in s. 14(1), provide for the protection of a judge as follows:

f No judge or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limit of his jurisdiction, nor shall any order for costs be made against him, provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of.

g In view of the immunity conferred on a judge by the aforesaid provision, the plaintiff's action against the defendant is clearly unsustainable and is doomed to fail right from the outset. It is also my finding by reason thereof that the hardship to the defendant if the writ is extended would far outweigh the hardship to the plaintiff if the extension is disallowed.

h For all the above reason I dismissed the appeal. There is no order as to costs.

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